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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1068

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER, PETITIONER

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, RESPONDENT

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

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RESPONDENT, AND APPELLANT BELOW

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

CORRECTION OF ERRATA IN ORIGINAL PETITION

Counsel for the respondent very properly point out that the third paragraph on page 2 of the petition is not clear and they correctly assume that this is because of a typographical error. After the word "constituted", which appears in the last line and next to the last line

in said paragraph, the language should be "a complete defense to the life insurance features of said policies".

A further inaccuracy in the petition appears in the statement of the question involved on page 4. In the fourth line of that statement after the word "year", there should appear the language "and less than two years".

The respondent correctly sets out the question involved on page 3 of his brief opposing certiorari.

ARGUMENT

The Darden Case

The respondent relies very heavily upon the case of *Darden* v. *North American Benefit Association*, 170 Va. 479, 197 S. E. 413. In this respect the respondent follows the lead of Judge Parker who spoke for the Circuit Court of Appeals. Judge Parker's discussion of the Darden case is found on pages 15 and 16 of respondent's brief. The respondent complains that in our brief in support of the petition for writ of certiorari we make but one brief reference to the Darden case, that on page 31 of our brief. As we see it, the brief reference thus referred to accurately and correctly distinguishes the Darden case from the pending case. We say that the Darden case "involved a clear question of limitation of liability in express language and not a forfeiture as is provided by the policies here in question". However, if there be any question about the correctness of our statement, we wish to point out wherein the Darden case is distinguishable. The applicable provision of the policy of insurance in that case is as follows:

> "Article VII, Sec. 4. Should the member die or death be caused directly or indirectly from any of the following diseases or causes, either acute or chronic, contracted within two years from date of this certificate, or within two years after reinstatement of membership, from heart disease, liver, bladder, stomach or kidney trouble, * * * the Association will pay one-fifth of the amount otherwise payable under the terms of the membership certificate. If death is caused from surgical operation within said two-year period, the liability shall be one-fifth of the amount otherwise payable". (170 Va. 481)

It is difficult for us to conceive of language that could more definitely and positively limit the liability of an insurance company in certain specified events than the language which was thus used. As a matter of fact, Darden died within two years of the issue of the policy of valvular heart disease. He held a policy wherein the company's liability in such an event was limited to one-fifth of what the beneficiary would otherwise have been entitled to. As we see it, far from overruling *United Security Life Insurance & Trust Co.* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306, the Court reaffirmed the doctrine of that case in the following language:

> "In the case of *United Security Life Insurance & Trust Co.* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306, the question was not the amount payable under the terms of the policy, but whether or not the policy was void because of the breach of a covenant subsequent. In that case, there was a valid contract of insurance. Its terms, its provisions and the amount payable were all clearly set out. There was a covenant, however, by the

insured that he would not engage in service on any railway train after the issuance of the policy. In violation of that covenant, he was killed while acting as a brakeman for a railway company. There were no original reservations as to the risk assumed, but there was a provision for the forfeiture of the contract upon the breach of the covenant subsequent. The company did not undertake, during the lifetime of the insured, to cancel the contract for the breach of the covenant. It was there held that the policy was incontestable upon the grounds assigned.

"Mr. Justice Holt, after reviewing numerous authorities, and approving the holding in *Metropolitan Life Insurance Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642, said: 'Here the policy is a valid contract of insurance. In its inception no exceptions appear upon its face, and, if defeated, it must be, not because of original reservations, but because of some covenant broken. The latter possibility is one which the statute (section 4228) was designed to meet'.

"The effect of an incontestable clause or statute on an exclusion of the kind in question here was considered in *Metropolitan Life Insurance Co.* v. *Conway*, supra. There the company sought to impose on policies of life insurance issued in New York the following rider:

" 'Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this policy; but if the insured shall die as a result, directly or indirectly of such service, travel or flight, the company will pay to the beneficiary the reserve on this policy.'

> "In holding that the foregoing rider was a valid provision, and not in conflict with a statutory incontestable provision, Chief Justice Cardozo said: 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid at its inception or thereafter became invalid by reason of a condition broken. * * * . Cases cited." (170 Va. 483, 484)

Again, as in the *Massey* case, reference was had to *Metropolitan Life Insurance Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642, and it will be recalled that in that case Judge Cardozo indicated plainly that where a policy was upon its face incontestable after one year and this was coupled with the further condition that it should be void should the insured die by his own hand, then in such case the incontestable clause prevailed and there could be a recovery, notwithstanding the suicide of the policy holder. It will further be remembered that in that opinion Judge Cardozo said:

> "It is quite another thing to say that the same facts will prevail against a refusal to assume the risk".

And it will be further remembered that this language of Judge Cardozo was quoted with approval in the *Massey* case, as we pointed out on page 21 of our brief.

It is true that in the *Massey* case the opinion by Judge Spratley is susceptible to the construction that the *Massey* case was decided because of the distinction

"made between facts which might have warranted a recision of the contract and those cases involving risks not covered by the contract". An examination of the opinion of the *Massey* case clearly shows that this was only one of the reasons for the decision of the Supreme Court of Appeals of Virginia. It is briefly discussed in the opinion, 159 Va. 832, on pages 853 and 854. That discussion begins with the statement: "The company cannot prevail for another reason". All of the preceding part of the opinion is predicated upon the holding that the language of the policy worked a forfeiture and did not constitute either an exclusion of risk or a limitation of liability. Notwithstanding the charge of the respondent that we have made inaccurate and misleading assertions, we now and here repeat that the language of the policy in the *Massey* case is for all practical purposes identical with the language of the policies in the present case, and we expect to hereinafter demonstrate the truth of this statement.

JUDGE PARKER'S OPINION

The respondent quotes from Judge Parker's opinion on page 6 of his brief as follows:

> "It is perfectly clear, we think, that any language showing that liability of the insurer under the policy shall not extend to death from suicide and that, in such event, the premiums paid on the policy shall be returned, is a sufficient compliance with the requirement of the statute".

We have no quarrel whatsoever with this statement as a principle of general law and are prepared to concede for the sake of argument that it is probably the majority rule. We insist that it is not the rule in Virginia, because

if it had been, the first opinion and decision in the *Massey* case would have remained undisturbed, because in that case there was language used by which the insurer clearly attempted to provide that the policy should not extend to death while engaged in railway service, and the Virginia Court in its second opinion held the provision invalid and not available as a defense because of the incontestable clause. Certainly the Virginia Court was of the opinion that there was some sort of magic in a particular phrase, and so did Judge Cardozo in *Metropolitan Life Insurance Co.* v. *Conway*, supra, as their opinions clearly show, Judge Parker to the contrary notwithstanding. If it be true, as stated by Judge Parker on page 6 of respondent's brief that

> "a provision to the effect that, in case of suicide, a life policy shall be void, is as definite a statement as could possibly be made that the coverage of the policy does not extend to suicide or, what is the same thing, that the liability of the company is so limited as not to cover suicide"

and if it be true that this is the law of Virginia, then the *Massey* case should have gone off upon the theory that there was an exclusion of risk with respect to railway service, because that is precisely what the policy in the Massey case provided with respect to such service. We are not concerned with the holding of *Moore* v. *Bankers' Credit Life Ins. Co.*, 223 Ala. 373, 136 So. 798, referred to by Judge Parker and quoted on page 7 of respondent's brief because, as we see it, the Virginia Court is not in accord with the Alabama rule.

Again, the quotation from Judge Parker's opinion on page 8 of respondent's brief to the effect

> "It is clear, therefore, that the suicide clause, whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered, is necessarily a limitation on coverage. Its effect is to except death by suicide from the promise to pay the amount of the policy in case of death."

seems to us to be in the teeth of the *Massey* case. If that is the law of Virginia with respect to suicide, it must also be the law where a company, by using such language as is used in the present policies, attempts a limitation on coverage as to railway service. The *Massey* case holds definitely to the contrary.

We cannot agree with the statement made in Judge Parker's opinion and quoted on page 10 of respondent's brief as follows:

> "While language was used indicating that this would be the proper holding (*Massey* case) if breach of condition related to the suicide clause, the mind of the court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause."

We do not understand how this statement can be made in view of the fact that, as was pointed out on page 16 of our brief, the two opinions of the Court discussed or cited every suicide case cited by the respondent (in its brief in the Circuit Court of Appeals) with the sole exception of *Moore* v. *Bankers' Credit Life Ins. Co.*, supra. We cannot understand this statement in view of the fact that approximately four pages of the first opinion deal with the discussion of suicide cases and that approximately one-half of the second opinion likewise deals with such cases. As we see it, to say that "the mind of the Court was not directed to that point and no account was taken

of the limitation of coverage necessarily involved in such clause" is to accuse the Supreme Court of Appeals of Virginia of crass stupidity.

Further, we take issue with Judge Parker in the statement quoted from his opinion on page 15 of respondent's brief as follows:

> "There can be no distinction in law or in reason between a provision to the effect that upon certain conditions one-fifth only of the face of the policy shall be payable and one to the effect that upon certain conditions the promise of the policy to pay the face amount shall be void and the premiums paid shall be returned".

This Court is quite aware of the fact that innumerable insurance companies write policies wherein the death benefits increase according to the number of years the policy is carried. Is this not a limitation of liability clearly expressed, and is not the provision of the policy in the Darden case, to which Judge Parker was referring, a clear and plain limitation of liability in the event of death from certain causes? There is no forfeiture worked. There is a definite statement that in one event one amount will be paid and in another event a different amount will be paid. This is quite similar to policies which by their terms exclude death while in military service from the coverage of the policy. As we pointed out on pages 20 and 21 of our brief, where the provision is that death while engaged in such service is not a risk assumed, the provision is held valid and available to the company as a defense. On the other hand, where the language used is that the policy shall be void if the insured engages in such service, it has no effect and is not available as a defense.

The respondent says on page 20 of its brief that we apparently miss the point of Judge Parker's reference to *Security Life Ins. Co. of America* v. *Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187. It is referring to our comment on pages 30 and 31 of our brief. We reply that the respondent has evidently missed the point that we attempted to make. We were not referring to Judge Parker's citation of the case referred to, but we were referring to that part of his opinion which shows that the Court was refusing to follow what it calls the dictum in the *Massey* case because that so-called dictum is "opposed to what we regard as the sound and reasonable rule arising out of the common law of the state". Our page reference is to the record, page 31. Judge Parker's citation of the case mentioned was on page 25 of the record. We referred to the case because it did hold that there could be no recovery on a life insurance policy in the event of suicide, but we at once attempted to point out that this rule had been abrogated by statute in Virginia; that the Trial Court based its decision not upon the common law of Virginia, but upon Section 4228 of the Code, as construed in the *Massey* case. We repeat now what was said on page 31 of our brief, "If the Circuit Court of Appeals has attempted to decide this case upon what it conceives to be the Common law of Virginia, it has plainly missed the crucial and controlling point which is involved". And yet, as we understand Judge Parker's language which we have quoted from page 31 of the record, that is precisely what the Court did.

We again insist that instead of our missing the point in Judge Parker's opinion, the respondent has entirely missed the point which we attempted to raise. This perhaps because of our inability to clearly express ourselves.

PROVISION FOR THE RETURN OF PREMIUMS

On page 13 of respondent's brief we are charged with making inaccurate and misleading statements in our brief.

It is true that inadvertently we quoted from the *Massey* case in such a way as to indicate that paragraph 9 is from the original opinion rather than the second opinion. Perhaps we should have made it plain that such was not the case. The fact is that paragraph 9 is the first paragraph of the second opinion and the language which we quoted ahead of paragraph 9, both on pages 17 and 19 of our brief, is the concluding paragraph of the first opinion. We were perhaps careless in not distinguishing between the two, but we do not see how that fact affects our argument in any respect. The other inaccuracies and misleading statements pointed out are confined almost exclusively to the fact that we failed to set out the provision of the suicide clause to the effect that "but in such event the company will return any premiums paid". We do set out this language when we quote the suicide clause on page 3 of our brief. We certainly had no purpose of concealing anything from this Honorable Court, but in our view of the case, the language referred to is utterly meaningless and without purpose. If the Court will examine Section 4228 of the Code of Virginia set out on pages 3 and 4 of our petition, it will see that the statute does not require any provision in the policy for the return of the premiums. The language which the statute says should be in the policy is "an express provision * * * limiting the liability of the insurer in the event that the insured shall within two years from the date thereof die by his own act (whether sane or insane)". It is further provided that "such

provision shall be valid but the insurer shall be obligated to return or pay at the least the amount of the premiums paid on account of such policy" but there is no requirement that this provision be written into the policy. It is imposed upon the insurer by law where the defense of suicide within two years is asserted and where the policy has carried such a provision as the statute requires. We suggest in passing that the otherwise able opinion of the District Judge is inaccurate in its apparent assumption that Section 4228 requires a provision for the return of premiums as quoted on page 13 of respondent's brief. We can explain the lapse only upon the theory that "even Homer sometimes nods".

We insist that as it is plain that the provision for the return of premiums does not have to appear as a part of the policy, the alleged distinction which the respondent repeatedly insists upon between the *Massey* case and the present case disappears from the picture. In the event that there had been a defense in the *Massey* case because of suicide, the fact that the policy did not provide for the return of the premiums would not have relieved the company of the obligation to return same. In the present case, if the language providing for the return of the premiums had not appeared in the policy, nevertheless there would have been a definite statutory duty and obligation upon the part of the company to refund the premiums if the defense of suicide was made. The point is not whether the present policies contain something which the statute does not require, but whether they contain "an express provision limiting the liability of the insurer in the event" of suicide, which the statute does require.

OTHER VIRGINIA CASES

We see nothing in *Ayres* v. *Harleysville Mutual Casualty Co.*, 172 Va. 383, 2 S. E. (2d) 303, that is in any wise

applicable to the case at bar. As a matter of fact, while that case held as stated by the respondent that the Court will not "make a contract for the parties which they did not make themselves and never intended to make", it held that in that case the language of the policy was ambiguous and construed it against the insurer.

Nor do we have any quarrel with the doctrine of *Harmon* v. *Farm Bureau Mutual Automobile Ins Co.*, 172 Va. 61, 200 S. E. 616, or *Kennard* v. *Travelers Protective Association*, 157 Va. 153, 159, 160 S. E. 38, 40, because in both of those cases the Court had under consideration provisions of policies which were clear and free from any doubt and so held. In this case this Court is considering two unquestionably conflicting clauses of a life insurance policy, to-wit: the suicide clause and the incontestable clause. The Virginia Court has held in the *Massey* case that under a substantially similar state of facts, (certainly so far as the language of the policies is concerned,) the incontestable clause prevails.

POINTS B, C, D, AND E

In view of the fact that respondent's entire argument on points B, C, D and E are based upon its effort to contend that the expressions from the *Massey* case upon which we rely are mere dictum without even persuasive value, and in view of the fact that we have attempted to refute this position, we see no occasion for any reply to the argument made with respect to the points mentioned.

CONCLUSION

We again insist that this case is one calling for the exercise by this Court of its supervisory powers, by grant-

ing a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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